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Supreme Court, U.S.
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In The
Supreme Court of the United States

OREN BENTON,

Petitioner,

v.

CAMECO CORPORATION,
a Canadian Corporation,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should a United States citizen's right to use the courts of his home forum to sue a foreign national who purposefully directed activities toward that forum be limited, as the Tenth Circuit held below, so that instead of having to present a compelling case of "unreasonableness," a foreign national need only pass a general balancing test to avoid personal jurisdiction and compel suit outside the United States?

2. Should this Court grant certiorari to resolve a Circuit conflict over how to assess the reasonableness of asserting personal jurisdiction over a non-resident defendant whose sufficient contacts with a resident plaintiff's forum gave rise to common law claims?

STATEMENT OF PARTIES

Petitioner Oren Benton is an individual U.S. citizen, and resident of the State of Colorado.

Respondent Cameco Corporation is a Canadian company, organized under the Canadian Business Corporation Act, with its principal offices in Saskatoon, Saskatchewan. Information from Cameco's internet web site, www.cameco.com, incorporated into the Tenth Circuit's published opinion, establishes that Cameco owns a subsidiary based in Colorado, and operates major uranium mines in Wyoming and Nebraska. *Benton v. Cameco Corporation*, 375 F.3d 1070, 1084 (Holloway, J., dissenting).

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CONSTITUTION

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PETITION FOR WRIT OF CERTIORARI

Petitioner Oren Benton respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit (App. 1-28) is published at 375 F.3d 1070. The Tenth Circuit denied petitions for rehearing and rehearing *en banc* in an order (App. 45) filed on October 5, 2004. The district court's order granting respondent's motion to dismiss (App. 29-44), dated November 14, 2002, is unpublished.

JURISDICTION

The Court of Appeals denied petitions for rehearing and rehearing *en banc* on October 5, 2004. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS OF CONSTITUTIONAL LAW

Section 1 of Article XIV in Amendment to the United States Constitution states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges

or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

I. Factual Background

Petitioner Oren Benton, a resident of the State of Colorado, is a mining industry consultant with substantial expertise in the mining and trading of uranium. Cameco Corporation (Cameco) is a Canadian corporation headquartered in Saskatoon, Saskatchewan, and is the world's largest producer of uranium.[1]

Between 1988 and 1996, Benton and Cameco engaged in at least two dozen uranium spot market transactions, each worth several million dollars. Benton negotiated these transactions with Cameco from Colorado, by phone and fax.

In the late summer and early fall of 1994, Benton began negotiating a large uranium purchase contract and joint venture agreement with Cameco. On November 1, 1994, Benton and Cameco executed a Memorandum of Understanding (the "MOU"). The final executed version of the MOU deleted the "non-binding" language that had appeared in earlier drafts, and the parties agreed to

[1] Although Cameco does not have offices in Colorado and is not authorized to conduct business in the state, Cameco has a wholly-owned U.S. subsidiary, Cameco, Inc., that is based in Colorado. The officers of Cameco and Cameco, Inc. overlap.

perform the various terms in the agreement. The MOU required Cameco to sell uranium to Benton for resale to third parties. The MOU also created a joint venture between Benton (through his Colorado company NUEXCO) and Cameco for world-wide uranium trading. The MOU did not contain a provision relating to jurisdiction or venue in the event of disputes involving the MOU.

The MOU was negotiated in Colorado and Canada. Cameco's employees traveled to Colorado to perform due diligence, including investigating, analyzing and evaluating Benton's sales contracts. Portions of the transactions contemplated by the MOU were to be performed in Colorado, and Cameco's payments to Benton were to be made in Colorado.

Despite assurances by Cameco's Vice President of Finance and Business Development that the MOU already had the effective approval of Cameco's board of directors, either the MOU was never brought to the board for consideration, or the board refused to approve the transactions contemplated by the agreement.[2] Cameco's renunciation of the MOU caused Benton losses totaling over $100 million dollars to himself and his affiliated companies. Benton was destroyed economically and was ultimately forced to declare bankruptcy.

II. Procedural Background

Benton filed his Complaint against Cameco on November 28, 2000 in the United States District Court,

[2] Benton was not permitted to conduct discovery, despite requests to do so. The District Court ruled on Cameco's motion to dismiss without an evidentiary hearing, relying on affidavits.

District of Colorado, asserting claims against Cameco for breach of contract and tortious interference with existing and prospective business relationships. On November 14, 2002, the District Court dismissed the action for lack of personal jurisdiction over Cameco, ruling that Cameco had not established minimum contacts with Colorado. (Pet.App. 29-44).

On July 23, 2004, a panel of the Tenth Circuit Court of Appeals affirmed the dismissal for lack of personal jurisdiction, in a split decision. The panel reversed the District Court decision on minimum contacts, finding instead that Cameco established sufficient contacts with Colorado and that Cameco purposefully availed itself of the privilege of conducting business in Colorado by:

- trading uranium with Benton since 1988;
- negotiating and entering into the MOU, which contemplated several specific uranium transactions (some of which would occur in Colorado) and a "continuing business relationship" with Benton through a joint venture; and
- sending several Cameco employees to Colorado to conduct due diligence review required by the MOU.

375 F.3d at 1077. Although the entire panel found that Cameco purposefully established sufficient contacts, the majority affirmed the District Court's dismissal of the case based on their analysis of the "reasonableness" factors discussed in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980) and in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985). The Tenth Circuit applied the "sliding scale" approach enunciated by the First Circuit, under which:

> the weaker the plaintiff's showing on [minimum contacts], the less a defendant need show in terms of unreasonableness to defeat jurisdiction. The reverse is equally true: an especially strong showing of reasonableness may serve to fortify a borderline showing of [minimum contacts].

375 F.3d at 1079 (quoting *OMI Holdings, Inc. v. Royal Ins. Co. of Canada*, 149 F.3d 1086, 1092 (10th Cir. 1998) (quoting *Ticketmaster-New York, Inc. v. Alioto* 26 F.3d 201, 210 (1st Cir. 1994))). The court determined that "the majority of the reasonableness factors weighs against the exercise of personal jurisdiction" and affirmed the District Court. 375 F.3d at 1081.

The Tenth Circuit panel majority focused on two issues: Cameco is a foreign company and the MOU was governed by Canadian law. 375 F.3d at 1078-80. The Tenth Circuit gave little or no consideration to the following facts:

- litigation in Colorado would not be inconvenient for Cameco because Cameco has a subsidiary in Colorado, mines nearby, and the distance between Saskatoon and Denver is less than the distance between Saskatoon and most major Canadian cities;
- the applicable Canadian common law is similar to Colorado common law; and
- Benton is a resident of the forum state, Colorado, which has a strong interest in providing its citizens an efficient and effective opportunity to seek redress for injuries by out-of-state actors.

The dissenting opinion by Judge Holloway reviewed these omissions by the majority, concluding that Cameco's contacts with Colorado were strong, and that Cameco

"failed to proffer the requisite 'compelling case' that the exercise of personal jurisdiction in this case is unreasonable." *Id.* at 1081-82 (Holloway, J., dissenting) (quoting *Burger King*, 471 U.S. at 477).

The Tenth Circuit denied Benton's petitions for rehearing and rehearing *en banc*. This petition followed.

REASONS FOR GRANTING THE WRIT

This case presents two important questions of federal constitutional law governing personal jurisdiction in federal courts. First, a United States citizen must have a right to access his home state's courts to sue a non-resident alien who purposefully establishes minimum contacts with the forum. If not, as the ruling below demonstrates, a United States citizen, resident in the forum state, will be forced to bring suit in a foreign country on common law claims that arose from the foreigner's purposeful contacts with the forum state. Such a result turns "fair play and substantial justice" on its head.

Second, the Tenth Circuit, in direct conflict with the Fourth, Seventh, Eleventh and Federal Circuits and precedents of this Court, formulated a test for assessing the reasonableness of asserting personal jurisdiction over a non-resident defendant which:

- does not require the defendant to demonstrate a "compelling case" of unreasonableness, as required by *Burger King,* once the plaintiff has shown that defendant purposefully established minimum contacts with the plaintiff's home, forum state; and

- does not give any particular weight to the plaintiff's status as a forum resident, requiring instead only a simple majority of the five reasonableness factors to defeat personal jurisdiction.

The Federal Circuit test, followed in three other Circuits, would have produced a different result below. That test properly retains the jurisdictional analysis set forth in *Burger King*, and thus limits a defendant's ability to defeat otherwise constitutional personal jurisdiction "to the rare situation in which the plaintiff's interest and the state's interest in adjudicating the dispute in the forum are so attenuated that they are clearly outweighed by the burden of subjecting the defendant to litigation within the forum." *Inamed Corp. v. Kuzmak*, 249 F.3d 1356, 1363 (Fed.Cir. 2001) (internal quotations and citations omitted). *Accord Pittsburgh Terminal Corp. v. Mid Allegheny Corp.*, 831 F.2d 522, 529 (4th Cir. 1987); *Heritage House Restaurants, Inc. v. Continental Funding Group, Inc.*, 906 F.2d 276, 284 (7th Cir. 1990); *Republic of Panama v. BCCI Holdings (Luxembourg) S.A.*, 119 F.3d 935, 947-48 (11th Cir. 1997). The Federal Circuit's test is the only test consistent with the Supreme Court's directive to shift the burden to defendant to present a compelling case of unreasonableness when the plaintiff is a forum resident. *See Burger King*, 471 U.S. at 477 ("a defendant who purposefully has directed his activities at forum residents . . . must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable"); *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 116 (1987) (Brennan, J., concurring) (only in "rare cases" will unreasonableness overcome purposeful forum contacts).

It has been almost two decades since this Court has taken a personal jurisdiction case. This Court should grant certiorari to resolve the conflict between the Circuits on the standard for determining personal jurisdiction when a forum resident sues a foreign company that has purposefully established forum contacts, a common occurrence in today's global economy.

I. A Forum Resident's Strong Interest in Suing a Non-Resident Alien Who Purposefully Established Minimum Contacts in the Forum State Must Be Paramount In Any Reasonableness Analysis.

A United States citizen must have access to courts in his home state to redress wrongs committed by a foreigner while engaging in business activities in the forum state. Notions of "fair play and substantial justice" cannot be achieved by requiring forum residents to sue defendants in a foreign country, even when those defendants have purposefully established sufficient contacts with the forum state.

The Tenth Circuit below, like a number of other Circuits, strayed from the Court's teaching on personal jurisdiction. The Court in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), held that an out-of-state defendant who established minimum contacts with the forum state was subject to personal jurisdiction, consistent with "traditional notions of fair play and substantial justice" embodied in the Due Process Clause of the Fourteenth Amendment. *Id.* at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). In *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), the Court expanded the

inquiry beyond minimum contacts, holding that in "appropriate case[s]" courts may evaluate: 1) "the burden on the defendant," 2) "the forum State's interest in adjudicating the dispute," 3) "the plaintiff's interest in obtaining convenient and effective relief," 4) "the interstate judicial system's interest in obtaining the most efficient resolution of controversies," and 5) the "shared interest of the several States in furthering fundamental substantive social policies." *Id.* at 292. The Court in *Burger King* synthesized the analysis, requiring that "[o]nce it has been decided that a defendant purposefully established minimum contacts within the forum State, these contacts may be considered in light of other factors" – the five factors listed in *World-Wide Volkswagen* – "to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice.'" *Burger King*, 471 U.S. at 476-77 (quoting *International Shoe,* 326 U.S. at 316). The Court shifted the burden, however, requiring that, "where a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." *Id.* at 477.

The Tenth Circuit completely ignored the "compelling case" aspect of *Burger King*. Instead of shifting the burden to Cameco to present a compelling case for why it should not have to defend a forum resident's lawsuit in Colorado, the Tenth Circuit engaged in simple balancing of the five reasonableness factors to conclude that Cameco should not be subjected to personal jurisdiction, despite its having purposefully established the requisite Colorado contacts. In so doing, the Tenth Circuit:

- afforded virtually no weight to the interest of the plaintiff of suing in his home state, 375 F.3d at 1084;
- gave scant consideration to the forum state's interest in providing an effective and accessible forum for its citizens, *id.*; and
- gave far too much weight to the burden on a Canadian company to defend a suit in Colorado under Canadian law, *id.* at 1083-85.

Thus, Cameco not only destroyed Benton economically, but poured salt in the wound by requiring Benton either to abandon his claims or seek redress in Canada for wrongs committed against a Colorado citizen arising out of Colorado contacts – a substantial injustice.

As the Court stated in *Burger King*, "because 'modern transportation and communications have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity,' it usually will not be unfair to subject him to the burdens of litigating in another forum for disputes relating to such activity." *Burger King*, 471 U.S. at 474 (quoting *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957)). Given this principle, and the fact that "the judicial systems of Canada and the United States are rooted in the same common law traditions," *Theunissen v. Matthews*, 935 F.2d 1454, 1462 (6th Cir. 1991), in all cases (located by petitioner) where a forum resident plaintiff sued a Canadian defendant who purposefully established minimum contacts, the inconvenience of litigating in the forum has been held insufficient to defeat personal jurisdiction. *See id.*; *Aristech Chemical Int'l Ltd. v. Acrylic Fabricators Ltd.*, 138 F.3d 624, 629 (6th Cir. 1998); *Schulptchair, Inc. v. Century Arts, Ltd.*, 94 F.3d 623, 632 (11th Cir. 1996); *Glinka v. Abraham & Rose Co.*

Ltd., 199 B.R. 484, 497 (D.Vt. 1996); *Engisn-Bickford Co. v. ICI Explosives USA Inc.*, 817 F.Supp. 1018, 1030-31 (D.Conn. 1993). *Cf. OMI Holdings, Inc. v. Royal Ins. Co. of Canada*, 149 F.3d 1086, 1096 (10th Cir. 1998) (fact that plaintiff was not a forum resident tipped scale to Canadian defendant).

The Tenth Circuit's departure from this precedent stems from its misguided reliance on the most recent personal jurisdiction case decided by the Court, *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987). In *Asahi*, a stream-of-commerce case that, unlike *Burger King*, involved *no* forum residents, the Court issued a plurality opinion finding no minimum contacts, and a majority opinion holding that an indemnification claim by a Taiwanese company against a Japanese company in a California court failed the reasonableness test. The court stated: "When minimum contacts have been established, often the interests of the plaintiff and the forum in the exercise of jurisdiction will justify even the serious burdens placed on alien defendants. In the present case, however, the interests of the plaintiff and the forum in California's assertion of jurisdiction over Asahi are slight." *Id.* at 114. As Justice Brennan stated in his concurring opinion: "This is one of those *rare cases* in which 'minimum requirements inherent in the concept of "fair play and substantial justice" . . . defeat the reasonableness of jurisdiction even [though] the defendant has purposefully engaged in forum activities.'" *Id.* at 116 (Brennan, J., concurring) (quoting *Burger King*, 471 U.S. at 477-78) (emphasis added). Despite the Court's distinction between *Asahi* on the one hand, and a case brought by a forum resident on the other, the Tenth Circuit placed a great deal of reliance on *Asahi* throughout its opinion in this case.

The interest of a forum resident should be paramount when a court determines whether a defendant has presented a compelling case to defeat otherwise constitutional jurisdiction. Thus in *Burger King*, a commercial contract case brought by a forum resident, the Court determined that the defendant had not made "a compelling case that the presence of some other considerations would render jurisdiction unreasonable." *Id.* at 477, 482. The Court set the "compelling case" burden high, suggesting that a defendant must show that litigation in the forum would be "so gravely difficult and inconvenient that a party unfairly is at a severe disadvantage in comparison to his opponent." *Id.* at 478 (internal quotations omitted).

Yet the Tenth Circuit, like several other Circuits, chose to apply a "sliding scale" to balance the strength of plaintiff's minimum contacts evidence against evidence relating to the five reasonableness factors discussed in *World-Wide Volkswagen* and *Burger King*. *Benton*, 375 F.3d at 1078-79 (quoting *OMI Holdings*, 149 F.3d at 1092 (quoting *Ticketmaster*, 26 F.3d at 210)). A sliding scale makes sense when none of the parties are forum residents (as in *Asahi* or *OMI Holdings*), but it is improper when a forum resident plaintiff asserts personal jurisdiction over a party who purposefully establishes minimum contacts in the forum.

United States citizens should not be locked out of their home forum once they establish minimum contacts unless the defendant can make a compelling showing that litigating in the forum would be so gravely difficult and inconvenient as to place the defendant at a severe disadvantage. Any lesser burden would contravene the Court's precedent, and require forum residents to chase defendants to a foreign court, even though the defendant

purposefully established minimum contacts sufficient to anticipate being haled into court in the plaintiff's forum.

II. The Tenth Circuit's Reasonableness Standard Directly Conflicts With The Federal Circuit's Test.

In the twenty years since *Burger King*, the Circuits have drifted into a surprising state of disunity in their application of this Court's basic principles of personal jurisdiction under *International Shoe*, *World-Wide Volkswagen*, *Burger King*, and *Asahi*. This disunity manifests itself most clearly in the direct conflict between the reasonableness standard used by several Circuits, including the Tenth Circuit in this case, and the test employed in other Circuits, most notably the Federal Circuit.

The Federal Circuit, like at least three other Circuits, follows this Court's personal jurisdiction decisions by conducting a minimum contacts analysis, and then considering the five reasonableness factors only where appropriate either to demonstrate that the exercise of personal jurisdiction is reasonable under the circumstances, or to assess whether the defendant has presented a "compelling case" that the exercise of personal jurisdiction by a forum resident would be unreasonable. *See Inamed Corp. v. Kuzmak*, 249 F.3d 1356, 1363 (Fed. Cir. 2001). The Fourth, Seventh and Eleventh Circuits are in accord. *Pittsburgh Terminal Corp. v. Mid Allegheny Corp.*, 831 F.2d 522, 529 (4th Cir. 1987); *Heritage House Restaurants, Inc. v. Continental Funding Group, Inc.*, 906 F.2d 276, 284 (7th Cir. 1990); *Republic of Panama v. BCCI Holding (Luxembourg) S.A.*, 119 F.3d 935, 947-48 (11th Cir. 1997).

In the Federal Circuit, the defendant's "compelling case" burden can be carried only in "the rare situation in which the plaintiff's interest and the state's interest in adjudicating the dispute in the forum are so attenuated that they are clearly outweighed by the burden of subjecting the defendant to litigation within the forum." *Inamed*, 249 F.3d at 1363 (internal quotations and citations omitted).

In the Tenth Circuit, on the other hand, as in several other Circuits, once purposeful contacts are shown, the court requires in *all* cases an analysis of each of the five reasonableness factors, and decides whether personal jurisdiction exists based on "whether the majority of the reasonableness factors weighs against an exercise of personal jurisdiction" – a simple balancing test conducted in every case without shifting the burden to defendant to show a compelling case of unreasonableness. *Benton*, 375 F.3d at 1081.

The First and Ninth Circuits employ the same analysis as the Tenth Circuit, requiring a simple majority of the reasonableness factors to defeat jurisdiction when minimum contacts are "weak" – a "sliding scale" balancing test employed in every case regardless of whether the plaintiff is a forum resident. *Ticketmaster*, 26 F.3d at 210; *Core-Vent Corp. v. Nobel Indus. AB*, 11 F.3d. 1482, 1487-88 (9th Cir. 1993) (balancing seven factors, including the five articulated in *World-Wide Volkswagen* and *Burger King*).

The Second, Third, Fifth, and Sixth Circuits require an analysis of reasonableness in every case where minimum contacts are shown, regardless of whether the plaintiff is a forum resident, but do shift the burden to the defendant to make a compelling case of unreasonableness.

Metropolitan Life Ins. Co. v. Robertson Ceco Corp. 84 F.3d 560, 568 (2d Cir. 1996); *Cabaret Sav. Bank, F.A. v. Shushan*, 954 F.2d 141, 150 (3d Cir. 1992); *Wien Air Alaska, Inc. v. Brandt*, 195 F.3d 208, 215 (5th Cir. 1999); *Lanier v. American Board of Endodontics*, 843 F.2d 901, 910 (6th Cir. 1988).

The Eighth Circuit employs a balancing test, but its test thoroughly mixes minimum contacts analysis with the *Burger King* and *World-Wide Volkswagen* reasonableness factors. *See Falkirk Min. Co. v. Japan Steel Works, Ltd.*, 906 F.2d 369, 374 (8th Cir. 1990) (considering: (1) the nature and quality of the contacts with the forum state; (2) the quantity of the contacts with the forum state; (3) the relation of the cause of action to the contacts; (4) the interest of the forum state in providing a forum for its residents; and (5) the convenience of the parties.)

Thus most Circuit Courts, with the exception of the Federal, Fourth, Seventh and Eleventh Circuits, require an analysis of reasonableness factors in *all* cases where minimum contacts are found, despite this Court's pronouncements that such factors need only be evaluated in "appropriate cases," *Burger King*, 471 U.S. at 476-77 (quoting *World-Wide Volkswagen*, 444 U.S. at 292), and that these factors may defeat jurisdiction only in "rare cases." *Asahi*, 480 U.S. at 1034 (Brennan, J., concurring). And only the Federal, Fourth, Seventh and Eleventh Circuits recognize the importance this Court places on the existence of a forum resident plaintiff and the heightened burden to be carried by a defendant in such circumstances. *See Republic of Panama*, 119 F.3d at 948 ("The burden is on the defendant to demonstrate that the assertion of jurisdiction in the forum will 'make litigation so gravely difficult and inconvenient' that [he] unfairly is at a 'severe

disadvantage' in comparison to his opponent.") (quoting *Burger King*, 471 U.S. at 478).

The contrast between the "Federal Circuit" approach and the "Tenth Circuit" approach test is stark, and should be resolved on certiorari by this Court. Given the disarray among the rest of the Circuit Courts, guidance from this Court is clearly necessary. In the nearly twenty years since the Court's last personal jurisdiction opinion, lower courts have lost their focus, placing greater emphasis on the defendant's inconvenience than on the plaintiff's right to a forum.

As the world continues to shrink and more international cases are filed in the federal courts, the Court should correct the lower courts' tendency to invoke *Asahi* in any personal jurisdiction case involving a foreign defendant – even in cases where the plaintiff is a forum resident.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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January 3, 2005

APPENDIX A

United States Court of Appeals,
Tenth Circuit

No. 02-1548

Oren L. BENTON, Appellant-Plaintiff,
v.
CAMECO CORPORATION, a Canadian corporation,
Appellee-Defendant.

375 F.3d 1070 (10th Cir. 2004)

(Filed July 23, 2004)

Before HENRY, HOLLOWAY, and ANDERSON, Circuit Judges.

HENRY, Circuit Judge.

This case arises from a contract dispute between a Colorado resident, the plaintiff Oren L. Benton, and a Canadian company, the defendant Cameco Corporation. Mr. Benton and Cameco entered into a Memorandum of Understanding in which Mr. Benton agreed to purchase uranium from Cameco for resale. The agreement also set forth the key terms of a planned joint venture to conduct uranium trading activities. When Cameco's board did not approve the transactions contemplated by the Memorandum of Understanding, Mr. Benton sued Cameco in federal district court in Colorado, asserting claims for breach of contract and tortious interference with existing and prospective business relationships. The district court granted Cameco's motion to dismiss on the grounds that Cameco did not have sufficient contacts with Colorado to

allow the court to exercise personal jurisdiction over Cameco. Mr. Benton appealed. Because we agree with the district court that personal jurisdiction is inappropriate in this case, we AFFIRM.

I. BACKGROUND

Mr. Benton is a Colorado resident who has been engaged in the business of mining, milling, brokering, and trading uranium for many years. Cameco is a Saskatchewan company organized under the Canada Business Corporations Act with its principal offices in Saskatchewan.

Between 1988 and 1996, Mr. Benton's NUEXCO Trading Company ("NTC") and Cameco entered into a series of approximately two dozen transactions concerning the sale of uranium. These transactions typically consisted of Cameco selling uranium to NTC, buying uranium from NTC, or swapping its uranium for a like amount of NTC's uranium. The transactions were "spot market" transactions, meaning that "each transaction involved separate, independent contractual negotiations, as opposed to a series of sales or trades pursuant to a single, longer term contract." Aplt's Br. at 5-6 n. 2. Such transactions were made in the ordinary course of business and did not require the approval of Cameco's Board of Directors.

In November 1994, Mr. Benton and Cameco entered into the Memorandum of Understanding ("MOU"), the document at issue in this case. The MOU describes two separate transactions between Mr. Benton and Cameco. First, Cameco would provide Mr. Benton's affiliates with quantities of uranium to satisfy Mr. Benton's sales commitments to eighteen different utility companies around

the world. Second, the MOU provided for the creation of a joint venture pursuant to which the parties, under Cameco's control, would conduct future uranium trading activities.

The MOU conditioned the agreement to pursue these transactions upon several factors, including (a) a satisfactory due diligence review by Cameco of Mr. Benton's eighteen purported uranium sales contracts and (b) the approval of Cameco's Board of Directors. *See* Aplt's App. at 133-134(MOU).

After the MOU was signed, members of Cameco's staff spent two days in Colorado conducting the due diligence review of Mr. Benton's eighteen supply contracts. In December 1994, Cameco's Board of Directors met and declined to approve any of the transactions listed in the MOU.

In November 2000, Mr. Benton filed this case against Cameco in federal district court in Colorado, alleging breach of contract and tortious interference with existing and prospective business relationships. Cameco filed a motion to dismiss, arguing, *inter alia,* that the district court lacked personal jurisdiction over Cameco. The district court agreed, reasoning that Cameco had not established minimum contacts with Colorado because (1) Cameco's contract negotiations with Mr. Benton, a Colorado resident, were insufficient to create minimum contacts with Colorado; (2) under 16 proposed sales contracts, delivery of uranium products would not take place in Colorado, as there are no uranium processing facilities there; (3) Cameco's staff's brief visit to Colorado was insufficient to establish minimum contacts with Colorado; (4) the existence of a Colorado subsidiary of Cameco did

not establish the necessary minimum contacts as the subsidiary was not an alter-ego of Cameco; and (5) it would be unfair to require a foreign corporation to defend this case in Colorado.

In addition, the district court stated that "[a]lthough it is technically unnecessary and possibly inappropriate for the Court to consider the merits of the claims where it has found that it lacks jurisdiction . . . it [felt] compelled to do so." Aplt's App. at 191-92 (Dist. Ct. Order, filed Nov. 15, 2002). On the merits, the court concluded that Mr. Benton had failed to state either a breach of contract or a tort claim. On the contract claim, the district court found that because "Benton's complaint concede[d] that the MOU expressly condition[ed] the existence of [the] potential transactions upon certain occurrences or performance" and because Mr. Benton affirmatively alleged that one of these conditions, the approval of the Cameco board of directors, did not occur, "there could be no contract to breach." *Id.* at 192-93. As to the tort claim, the district court found that "Cameco's directors were entitled if not mandated to exercise their discretion in their review of the proposed transactions," and "the fact that the board of directors did not approve the agreement cannot constitute a lack of bona fide honesty or good faith simply because it was not consistent with the feeling of security" that Mr. Benton obtained from Cameco. *Id.* at 194.

Mr. Benton now appeals the rulings of the district court. We disagree with the district court's conclusion that Cameco lacked minimum contacts with Colorado; however, we hold that "traditional notions of fair play and substantial justice," *Asahi Metal Indus. Co. v. Superior Court of Calif.*, 480 U.S. 102, 113, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987), counsel against an exercise of personal jurisdiction

over Cameco. Therefore, we conclude that the district court properly dismissed Mr. Benton's claims because it lacked personal jurisdiction over Cameco.[1]

II. DISCUSSION

"We review de novo the district court's dismissal for lack of personal jurisdiction." *Soma Med. Int'l v. Standard Chartered Bank,* 196 F.3d 1292, 1295 (10th Cir. 1999). "[W]hen the court's jurisdiction is contested, the plaintiff has the burden of proving jurisdiction exists." *Wenz v. Memery Crystal,* 55 F.3d 1503, 1505 (10th Cir. 1995). "When, as in this case, a district court grants a motion to dismiss for lack of personal jurisdiction without conducting an evidentiary hearing, the plaintiff need only make a prima facie showing of personal jurisdiction to defeat the motion." *Soma,* 196 F.3d at 1295. "We resolve all factual disputes in favor of the plaintiff in determining whether plaintiff has made a prima facie showing." *Far West Capital, Inc. v. Towne,* 46 F.3d 1071, 1075 (10th Cir. 1995). Mr. Benton contends he has made a prima facie showing of the court's jurisdiction over Cameco.

"To obtain personal jurisdiction over a nonresident defendant in a diversity action, a plaintiff must show that jurisdiction is legitimate under the laws of the forum state and that the exercise of jurisdiction does not offend the due process clause of the Fourteenth Amendment." *Soma,* 196 F.3d at 1295 (internal quotation marks omitted). "Colorado's long arm statute is coextensive with constitutional limitations imposed by the due process clause.

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[1] Because we dismiss the case for lack of personal jurisdiction, we do not address the district court's dismissal for failure to state a claim.

Therefore, if jurisdiction is consistent with the due process clause, Colorado's long arm statute authorizes jurisdiction over a nonresident defendant." *Day v. Snowmass Stables, Inc.*, 810 F.Supp. 289, 291 (D.Colo. 1993) (citing *Mr. Steak, Inc. v. District Court*, 194 Colo. 519, 574 P.2d 95, 96 (1978)).

Our opinion in *OMI Holdings, Inc. v. Royal Ins. Co. of Canada*, 149 F.3d 1086 (10th Cir. 1998), carefully and succinctly lays out the well-established constitutional analysis for personal jurisdiction:

> "The Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts ties, or relations.'" *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985). Therefore, a "court may exercise personal jurisdiction over a nonresident defendant only so long as there exist 'minimum contacts' between the defendant and the forum state." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980). The requirement that "minimum contacts" be present protects a defendant, who has no meaningful contact with a state, from the burdens of defending a lawsuit far from home in a forum where the substantive and procedural laws may be quite different from those with which the litigant is familiar. *See id.* at 292, 100 S.Ct. 559. . . .
>
> The "minimum contacts" standard may be met in two ways. First, a court may, consistent with due process, assert *specific* jurisdiction over a nonresident defendant "if the defendant has 'purposefully directed' his activities at residents of the forum, and the litigation results from alleged

> injuries that 'arise out of or relate to' those activities." *Burger King,* 471 U.S. at 472, 105 S.Ct. 2174 (internal quotations omitted). Where a court's exercise of jurisdiction does not directly arise from a defendant's forum-related activities, the court may nonetheless maintain *general* personal jurisdiction over the defendant based on the defendant's general business contacts with the forum state. *Helicopteros Nacionales de Colombia v. Hall,* 466 U.S. 408, 415, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984).

Id. at 1090-91.

Mr. Benton asserts that Cameco is subject to both specific and general jurisdiction. We examine each below.

A. Specific Jurisdiction

A specific jurisdiction analysis involves a two-step inquiry. First we must consider whether "the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen,* 444 U.S. at 297, 100 S.Ct. 559. "Second if the defendant's actions create sufficient minimum contacts, we must then consider whether the exercise of personal jurisdiction over the defendant offends 'traditional notions of fair play and substantial justice.'" *OMI,* 149 F.3d at 1091 (quoting *Asahi,* 480 U.S. at 113, 107 S.Ct. 1026).

1. Minimum Contacts

In determining whether a defendant has established minimum contacts with the forum state, we examine whether the defendant "purposefully avail[ed] itself of the

privilege of conducting activities within the forum State." *Hanson v. Denckla,* 357 U.S. 235, 253, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958). A defendant's contacts are sufficient if "the defendant purposefully directed its activities at residents of the forum, and . . . the plaintiff's claim arises out of or results from 'actions by the defendant *himself* that create a substantial connection with the forum state.'" *OMI,* 149 F.3d at 1091 (quoting *Asahi,* 480 U.S. at 109, 107 S.Ct. 1026) (internal citations omitted).

Mr. Benton asserts that Cameco purposefully directed it activities at Colorado because:

> [1] Cameco entered into [the MOU] with a Colorado resident that set forth the key terms of a joint venture;
>
> [2] Cameco would have partially performed the transactions contemplated by the MOU in Colorado in that it would have made payments to Benton in Colorado;
>
> [3] Cameco sent employees to Colorado to conduct a due diligence review of Benton's business in connection with the MOU;
>
> [4] Cameco sent significant correspondence to Benton in Colorado; and
>
> [5] Cameco committed a tortious act by interfering with Benton's business relationships, the effects of which were suffered in Colorado.

Aplt's Br. at 13. Mr. Benton also asserts that the MOU created a current and binding relationship for the purchase and sale of uranium to satisfy Mr. Benton's eighteen utilities contracts, creating an additional contact between Cameco and Colorado resident Mr. Benton. Aplt's Reply Br. at 2.

Cameco, on the other hand, contends that it has not established minimum contacts with the state of Colorado. It points out that it "has no bank accounts in Colorado, has no office or property in Colorado, is not licensed to do business in Colorado, has no employees in Colorado, does not advertise or solicit business in Colorado[,] and does not pay taxes in Colorado." Aple's Br. at 4. Furthermore, Cameco argues that personal jurisdiction is improper because (1) the proposed transactions of uranium with Mr. Benton would not take place in Colorado, as none of the eighteen utilities Mr. Benton had contracted to supply are in Colorado and there are no uranium processing facilities in Colorado; (2) it was Mr. Benton, not Cameco, who solicited the transactions; (3) neither the communications between the two companies, nor the execution of the MOU, nor the brief due diligence review were sufficient to establish minimum contacts; (4) Cameco never made any payments to Mr. Benton in Colorado; (5) Mr. Benton's residence in Colorado is a mere coincidence that had no role in the parties' dealings; and (6) the economic impact of Cameco's alleged breach of contract and tortious activity on Mr. Benton's Colorado business is not sufficient to establish jurisdiction.

We note at the outset that this is a very close case. We emphasize that the question of "[w]hether a non-resident defendant has the requisite minimum contacts with the forum state to establish in personam jurisdiction must be decided on the particular facts of each case." *Kuenzle v. HTM Sport-Und Freizeitgerate AG,* 102 F.3d 453, 456 (10th Cir. 1996) (internal quotation marks omitted). The facts of this case place it in the grey area of personal jurisdiction analysis. However, we hold that there are

enough contacts between Cameco and Colorado to establish what may be accurately termed "minimum" contacts.

A contract between an out-of-state party and a resident of the forum state cannot, standing alone, establish sufficient minimum contacts with the forum. *Burger King,* 471 U.S. at 473, 105 S.Ct. 2174. However, "with respect to interstate contractual obligations . . . parties who reach out beyond one state and create continuing relationships and obligations with citizens of another state are subject to regulation and sanctions in the other State for the consequences of their activities." *Burger King,* 471 U.S. at 473, 105 S.Ct. 2174 (internal quotation marks omitted). In a contract case, relevant factors for assessing minimum contacts include "prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing." *Id.* at 479, 105 S.Ct. 2174.

In this case, the parties entered into a "Memorandum of Understanding" that proposed the terms of several uranium transactions and a joint venture to pursue uranium trading activities. The "prior negotiations" and the "contemplated future consequences" of the MOU centered around the continuing business relationship between Cameco and Mr. Benton. Although the uranium transactions themselves would occur in places other than the state of Colorado, the business end of the transactions – the brokering of the deals, the coordination of the parties, the exchange of money and information between the parties, and the decision – making behind the joint venture – would take place partially in Canada, where Cameco has its principal place of business, and partially in Colorado, where Mr. Benton has his principal place of business. Indeed, the instant dispute does not concern the

uranium transactions, but the conduct of the parties in redefining their business relationship. By engaging in a business relationship with Mr. Benton, who operates his business from Colorado, Cameco "'purposefully avail[ed] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.'" *Burger King,* 471 U.S. at 475, 105 S.Ct. 2174 (quoting *Hanson,* 357 U.S. at 253, 78 S.Ct. 1228).

Although "phone calls and letters are not necessarily sufficient in themselves to establish minimum contacts," *Far West,* 46 F.3d at 1077, the correspondence exchanged between Cameco and Mr. Benton during the negotiation of the MOU provides additional evidence that Cameco pursued a business relationship with a Colorado business. Even more significant to our minimum contacts analysis, Cameco sent several of its employees to Mr. Benton's office in Colorado to conduct the due diligence review required by the MOU. Cameco not only established a business relationship with Mr. Benton's Colorado-based company on paper, but it also sent representatives to Colorado, the forum state, in order to maintain and further that business relationship. Although the due diligence review would have not been enough, in isolation, to establish minimum contacts, it represents an additional instance in which Cameco purposefully and knowingly availed itself of a business opportunity in Colorado.

Cameco argues that Mr. Benton's presence in Colorado is a mere coincidence that is inadequate to confer specific jurisdiction over Cameco. However, we do not agree that "[t]he quality and nature" of Cameco's contact with Colorado was "so . . . random, fortuitous, [and] attenuated that it cannot fairly be said that [Cameco] should reasonably anticipate being haled into court" in Colorado. *Burger*

King, 471 U.S. at 486, 105 S.Ct. 2174 (citations and quotation marks omitted). This is not a case in which the defendant's only contacts with the forum resulted from "the mere unilateral activity" of the plaintiff. *See World-Wide Volkswagen,* 444 U.S. at 298, 100 S.Ct. 559 (holding that personal jurisdiction over defendant car manufacturer was inappropriate when defendant's only contacts with the forum resulted from plaintiff's unilateral activity of driving defendant's product into another state); *Hanson,* 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (holding that personal jurisdiction over defendant trustee was inappropriate when defendant's only contacts with the forum resulted from plaintiff-settlor's unilateral activity of moving to Florida). Rather, Cameco voluntarily conducted business with Mr. Benton, whom Cameco knew to be located in Colorado for many years prior to and at the time of the events at issue. Again, Cameco's sending employees to conduct the due diligence review at Mr. Benton's place of business demonstrates Cameco's willingness to engage in bilateral business activity taking place in Colorado.

The touchstone of a minimum contacts analysis is whether "the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen,* 444 U.S. at 297, 100 S.Ct. 559. Cameco has transacted business with Mr. Benton since at least 1988, and at all times Mr. Benton has been located in Colorado. When Cameco negotiated and entered into the MOU in 1994, it voluntarily and knowingly entered into a relationship with a Colorado resident. Thus, Cameco "purposefully directed his activities at residents of the forum, and the litigation result[ed] from alleged injuries that arise out of or relate to those activities." *Burger King,* 471 U.S. at 472, 105 S.Ct.

2174 (internal quotation marks omitted). Over the course of Cameco's negotiations with Mr. Benton, Cameco established several minor contacts with the state of Colorado. Although none of these contacts individually could support a finding of minimum contacts, we find that in the aggregate, Cameco's "conduct and connection with the forum State [were] such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen,* 444 U.S. at 297, 100 S.Ct. 559. Thus, we hold that Cameco had sufficient minimum contacts to support an exercise of personal jurisdiction.

2. Traditional Notions of Fair Play and Substantial Justice

Although we have found that there are sufficient minimum contacts between Cameco and Colorado, we are also required to "consider whether the exercise of personal jurisdiction over the defendant offends traditional notions of fair play and substantial justice." *OMI,* 149 F.3d at 1091. Therefore, we inquire "whether a district court's exercise of personal jurisdiction over a defendant with minimum contacts is 'reasonable' in light of the circumstances surrounding the case." *Id.*

> In assessing whether an exercise of jurisdiction is reasonable, we consider [a] the burden on the defendant, [b] the forum state's interest in resolving the dispute, [c] the plaintiff's interest in receiving convenient and effective relief, [d] the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and [e] the shared interest of the several states in furthering fundamental social policies.

Id. at 1095. The analyses of minimum contacts and reasonableness are complementary, such that

> "[T]he reasonableness prong of the due process inquiry evokes a sliding scale: the weaker the plaintiff's showing on [minimum contacts], the less a defendant need show in terms of unreasonableness to defeat jurisdiction. The reverse is equally true: an especially strong showing of reasonableness may serve to fortify a borderline showing of [minimum contacts]."

Id. at 1092 (quoting *Ticketmaster-New York, Inc. v. Alioto,* 26 F.3d 201, 210 (1st Cir.1994)). Applying this framework, we conclude that an exercise of personal jurisdiction over Cameco in the District of Colorado would be inconsistent with traditional notions of fair play and substantial justice.

(a) Burden on Defendant of Litigating in the Forum

"[T]he burden on the defendant of litigating the case in a foreign forum is of primary concern in determining the reasonableness of personal jurisdiction. . . . When the defendant is from another country, this concern is heightened and 'great care and reserve should be exercised' before personal jurisdiction is exercised over the defendant." *Id.* at 1096 (quoting *Asahi,* 480 U.S. at 114, 107 S.Ct. 1026).

In this case, the burden on the defendant is significant. Cameco is a Canadian corporation with principal offices in Saskatchewan, and it has no office or property in Colorado, is not licensed to do business in Colorado, and has no employees in Colorado. *See id.* (finding burden on

defendants significant when Canadian corporation had no license to conduct business in Kansas, maintained no offices in Kansas, and employed no agents in Kansas). Cameco's officers and employees "will not only have to travel outside their home country, they will also be forced to litigate the dispute in a foreign forum unfamiliar with the Canadian law governing the dispute." *Id.* Therefore, this factor weighs against an exercise of personal jurisdiction over Cameco.

(b) Forum State's Interest in Adjudicating the Dispute

"States have an important interest in providing a forum in which their residents can seek redress for injuries caused by out-of-state actors." *Id.* "The state's interest is also implicated where resolution of the dispute requires a general application of the forum state's laws." *Id.* In this case, this factor favors both Mr. Benton and Cameco. Mr. Benton is a Colorado resident, and the state has an interest in providing him a forum for his suit against Cameco. However, the parties agree that Canadian law will govern the dispute. Therefore, this factor does not weigh heavily in favor of either party.

(c) Plaintiff's Interest in Convenient and Effective Relief

This factor

> hinges on whether the Plaintiff may receive convenient and effective relief in another forum. This factor may weigh heavily in cases where a plaintiff's chances of recovery will be greatly diminished by forcing him to litigate in another forum

> because of that forum's laws or because the burden may be so overwhelming as to practically foreclose pursuit of the lawsuit.

Id. at 1097. Because Canadian law governs the suit and because Mr. Benton has not established that litigating the matter in Canada would cause undue hardship to him, we find that Mr. Benton would be able to receive convenient and effective relief by bringing suit in Canada. Therefore, this factor weighs in Cameco's favor, against an exercise of jurisdiction.

(d) Interstate Judicial System's Interest in Obtaining Efficient Resolution

This factor asks "whether the forum state is the most efficient place to litigate the dispute." *Id.* "Key to the inquiry are the location of witnesses, where the wrong underlying the lawsuit occurred, what forum's substantive law governs the case, and whether jurisdiction is necessary to prevent piecemeal litigation." *Id.* (citations omitted). Based on the nature of Mr. Benton's claims against Cameco, many of the witnesses in the dispute would be directors, officers, and employees of Cameco, all of whom are located in Canada. Likewise, the alleged wrong, Cameco's failure to approve the transactions in the MOU, occurred in Canada, and Canadian law will govern the dispute. Moreover, Mr. Benton need not litigate the action in Colorado to avoid piecemeal litigation. *Id.* Therefore, we find that litigating the dispute in Colorado would not be more efficient than in Canada.

(e) States' Interest in Furthering Fundamental Substantive Social Policies

The fifth factor of the reasonableness inquiry "focuses on whether the exercise of personal jurisdiction by [the forum] affects the substantive social policy interests of other states or foreign nations." *Id.* "The Supreme Court has cautioned that 'great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field.'" *Id.* at 1097-98 (quoting *Asahi,* 480 U.S. at 115, 107 S.Ct. 1026). Therefore, we must look closely at the extent to which an exercise of personal jurisdiction by Colorado over Cameco interferes with Canada's sovereignty. *Id.* Relevant facts include "whether one of the parties is a citizen of the foreign nation, whether the foreign nation's law governs the dispute, and whether the foreign nation's citizen chose to conduct business with a forum resident." *Id.* at 1098 (citations omitted). Cameco did chose to conduct business with Mr. Benton, a resident of Colorado. However, Cameco is a Canadian corporation, Canadian law will govern the dispute, and we are required to give deference to the international nature of this case. Therefore, we find that an exercise of personal jurisdiction would affect Canada's policy interests.

We have already concluded that Cameco's contacts with Colorado were quite limited, barely satisfying the minimum contacts standard. As a result, Cameco need not make a particularly strong showing in order to defeat jurisdiction under this reasonableness inquiry. *OMI,* 149 F.3d at 1092. Because the majority of the five reasonableness factors weigh in Cameco's favor, we hold that an exercise of personal jurisdiction over Cameco would offend traditional notions of fair play and substantial justice.

B. General Jurisdiction

Although we have found that the Colorado district court lacks specific jurisdiction over Cameco, we must further inquire whether general jurisdiction exists. "Because general jurisdiction is not related to the events giving rise to the suit, courts impose a more stringent minimum contacts test, requiring the plaintiff to demonstrate the defendant's continuous and systematic general business contacts." *OMI,* 149 F.3d at 1091 (internal quotation marks omitted).

Mr. Benton asserts that Cameco has such contacts with Colorado because (1) in addition to the dealings at issue in this case, Cameco and Mr. Benton engaged in two dozen "spot market" transactions between 1988 and 1996, and (2) Cameco has a wholly-owned U.S. subsidiary, Cameco, Inc., that is licensed to do business in Colorado. We disagree. First, the occurrence of two dozen transactions taking place over a period of eight years, with the last taking place at least four years before suit was filed in November 2000, is not sufficient to meet the high burden of demonstrating that Cameco had "continuous and systematic general business contacts." Second, as the district court observed, Mr. Benton has not alleged nor produced evidence to show that Cameco, Inc., is the general agent or alter ego of Cameco. His allegation that "there is an overlap of current and former officers and directors of Cameco and Cameco, Inc.," Aplt's Br. at 21 – an overlap that actually consists of one common officer – is insufficient proof. "[A] holding or parent company has a separate corporate existence and is treated separately from the subsidiary in the absence of circumstances justifying disregard of the corporate entity." *Quarles v. Fuqua Indus., Inc.,* 504 F.2d 1358, 1362 (10th Cir.1974).

Therefore, the activities of Cameco, Inc., in Colorado cannot be imputed to Cameco for the purpose of assessing Cameco's general business contacts with Colorado. Because Cameco has not established "continuous and systematic general business contacts" with Colorado, an exercise of personal jurisdiction over Cameco is improper.

C. Failure to State a Claim

Because we have concluded that the court lacks personal jurisdiction over Cameco, we need not address the district court's determination that Mr. Benton failed to state a claim.

III. CONCLUSION

Although we hold that there are minimum contacts in this case, those contacts are so weak that our evaluation of "whether a district court's exercise of personal jurisdiction over a defendant with minimum contacts is 'reasonable' in light of the circumstances surrounding the case," *OMI,* 149 F.3d at 1091, takes on more importance. Because a majority of the reasonableness factors weigh against an exercise of personal jurisdiction, we find that an exercise of specific personal jurisdiction by the Colorado district court would be inappropriate under the facts of this case. Additionally, the requirements of general jurisdiction are not met. Therefore, we AFFIRM the district court's dismissal for lack of personal jurisdiction.

HOLLOWAY, Circuit Judge, concurring in part and dissenting in part:

The majority opinion concedes that minimum contacts are sufficiently shown for specific jurisdiction and I agree.

I am, however, unable to agree that Cameco has established this exercise of such specific jurisdiction here is so unreasonable as to be a violation of due process by offending traditional notions of fair play and substantial justice. Accordingly, I must respectfully dissent from the majority's holding of a due process violation in that respect and its disposition.

The majority found that Cameco had "purposely directed [its] activities" at a resident of Colorado and that Benton's claims are premised upon "injuries that arise out of or relate to those activities." Nonetheless, the majority concludes that the exercise of personal jurisdiction in this case by Colorado would violate Due Process because hailing Cameco into a Colorado court would "offend traditional notions of fair play and substantial justice." I disagree for two principal reasons: Cameco's contacts with Colorado were not "quite limited" and Cameco failed to proffer the requisite "compelling case" that the exercise of personal jurisdiction in this case is unreasonable. *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 477, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985).

A

More than limited contacts

The majority concludes that Cameco had only by a very slim margin established minimum contacts with Colorado in respect to the instant litigation. In so concluding, the majority noted that Cameco's contacts with Colorado were "minor" and supported a finding of minimum contacts only in the aggregate. While this reasoning may be correct insofar as it is necessary to look at a

defendant's contacts in the aggregate, it fails to recognize that the whole is greater than the sum of its parts.

In determining whether a defendant's contacts with the forum state are sufficient for a valid exercise of jurisdiction, the focus is not on the form or duration or number of those contacts but rather on whether those contacts "represent an effort by the defendant to purposefully avail itself of the privilege of conducting activities within the forum State." *Rambo v. American Southern Ins. Co.,* 839 F.2d 1415, 1418 (10th Cir. 1988) (internal quotation marks omitted). In other words, "the mere quantum of contacts between the forum and the defendant is not determinative of this issue." *Continental Am. Corp. v. Camera Controls Corp.,* 692 F.2d 1309, 1314 (10th Cir. 1982). Accordingly, "So long as it creates a substantial connection with the forum, even a single act can support jurisdiction." *Burger King Corp.,* 471 U.S. at 475 n. 18, 105 S.Ct. 2174.

Here, Cameco's contacts with Colorado were made as part of a deliberate effort by Cameco to enter into a contract with a known resident of Colorado. As the majority noted, the instant lawsuit arose from an alleged breach of a Memorandum of Understanding (MOU) between Cameco and Benton.[1] The acts contemplated by the MOU, future purchases of uranium and a joint venture, were to be partly performed in Colorado. *Id.* at 103. In addition, the formation of the MOU involved Cameco negotiating over the telephone and by mail with Colorado residents and

[1] The MOU was dated November 1, 1994, and executed for Cameco by Gerald Grandy, then Vice President of Finances and Business Development and Oren L. Benton. Appellant App. at 134.

Cameco sending two of its employees to Colorado to conduct a due diligence review.[2] *Id.*

These contacts, alone and in the aggregate, are clear manifestations of Cameco's desire to enter into a business relationship with a Colorado resident. And, when Cameco allegedly interrupted this relationship, the resulting damages accrued exactly where expected, in Colorado and borne by Colorado citizens. *Id.* at 17, 19. Under these circumstances, even if Cameco's contacts with Colorado were not numerous, this is a case where upon executing its agreement with Benton, Cameco should "reasonably anticipate being haled into court" in Colorado. *World-Wide Volkswagen v. Woodson,* 444 U.S. 286, 297, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980).

B

Traditional notions of fair play and substantial justice

As the majority correctly notes, "the reasonableness prong of the due process inquiry evokes a sliding scale. . . . " *OMI Holdings v. Royal Ins. Co. of Canada,* 149 F.3d 1086, 1092 (10th Cir. 1998). Thus, "depending on the strength of the defendant's contacts with the forum state, the reasonableness component of the constitutional test may have a greater or lesser effect on the outcome of the due process inquiry." *Metropolitan Life Ins. Co. v. Robertson-Ceco Corp.,* 84 F.3d 560, 568 (10th Cir. 1996). I believe the strength of Cameco's contacts with Colorado to be

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[2] Since corporations are legal fictions, a corporation's contacts with a forum state are created through the acts of its employees and agents. *International Shoe Co. v. Washington,* 326 U.S. 310, 316-17, 66 S.Ct. 154, 90 L.Ed. 95 (1945).

substantially stronger than the majority and would therefore require a greater showing of unreasonableness by Cameco. In any event, however, we are in agreement that Cameco has "purposefully directed [its] activities" at Colorado.

"[W]here a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present *a compelling case* that the presence of some other considerations would render jurisdiction unreasonable." *Burger King,* 471 U.S. at 477, 105 S.Ct. 2174 (emphasis added). In this case, that means Cameco must demonstrate that litigating this dispute in Colorado would be "so gravely difficult and inconvenient," that it would be at a "severe disadvantage in comparison to [Benton]." *Id.* I believe the majority errs in concluding Cameco has satisfied this burden by overestimating the difficulties Cameco would face were it to litigate these claims in Colorado, by underestimating the interest Colorado has to resolve this dispute, and by concluding, without support from the record, that Canada would be the most efficient venue.

i

The Burden on Cameco

The majority's conclusion that the exercise of personal jurisdiction in this case would be unreasonable rests primarily upon what I believe to be an exaggeration of the burden on Cameco to litigate in Colorado. In particular, the majority is concerned that litigation in Colorado will require Cameco employees to "travel outside their home country" and litigate the dispute "in a forum unfamiliar

with the Canadian law governing the dispute." Both of these concerns are overwrought.

As the majority noted, where a foreign defendant is forced to litigate in the United States, "great care and reserve should be exercised before personal jurisdiction is exercised" because of the heightened burden on the defendant. *OMI,* 149 F.3d at 1096. However, as the Supreme Court noted nearly a half century ago, "modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity." *McGee v. International Life Ins. Co.,* 355 U.S. 220, 223, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957). Since that time, transportation has become even more convenient. *See Sculptchair, Inc. v. Century Arts,* 94 F.3d 623, 632 (11th Cir. 1996) (holding the burden of forcing a Canadian defendant to litigate in Florida was "uncompelling"); *Aristech Chem. Int'l Ltd. v. Acrylic Fabricators Ltd.,* 138 F.3d 624, 629 (6th Cir. 1998) (holding that it was reasonable to require a defendant from Ontario to litigate in Kentucky because Ontario was "only a short plane flight" away). In this case, Cameco's headquarters in Saskatchewan is only a reasonable journey from Colorado and Cameco has already demonstrated its ability to make that trip by sending its employees to Colorado to conduct the due diligence review for the MOU. Appellant App. at 103.

In addition, even though Canadian and United States law are not completely congruent, both are "rooted in the same common law traditions." *Aristech Chem.,* 138 F.3d at 629. That commanality is especially acute in this case. Here, Benton's primary claim is that Cameco breached the implied duty of good faith and fair dealing. This duty of good faith is similar in both United States and Canadian

law. *See* David Stack, *The Two Standards of Good Faith in Canadian Contract Law,* 62 Sask. L.Rev. 201, 202-03 (1999) (commenting that in Canadian contract law, the doctrine of good faith has been described and applied in similar fashions as in United States law). Moreover, any differences may be easily discovered and dealt with as Canadian law is readily available electronically on both Westlaw and LexisNexis. Thus, "The unfairness of forcing a foreign party to litigate in an unfamiliar legal system is alleviated here by the fact that the Canadian legal system is similar in many respects to the legal system in the United States." *Ensign-Bickford Co. v. ICI Explosives USA, Inc.,* 817 F.Supp. 1018, 1031 (D.Conn.1993); *see also Southern Sys., Inc. v. Torrid Oven Ltd.,* 58 F.Supp.2d 843, 852 (W.D.Tenn.1999).

In addition, Cameco cannot credibly claim that forcing it to travel and litigate within the United States is akin to forcing it to retrieve three golden apples of the Hesperides. In addition to owning a subsidiary based in Nevada, Appellant App. at 75, Cameco operates major uranium mines in both Wyoming and Nebraska, Cameco 2003 Annual Report 18 (2003), *available at* http://www.cameco.com/investor_relations/annual/2003/common/pdfs/2003_ar_full-72dpi.pdf. Thus, Cameco employees regularly operate in and travel to the United States to conduct economic activity. Accordingly, I am satisfied that forcing Cameco to litigate this dispute in Colorado is not "gravely difficult and inconvenient." *Burger King,* 471 U.S. at 477, 105 S.Ct. 2174.

ii

The Forum's interest

Another factor to be considered in determining whether the exercise of personal jurisdiction is reasonable in this case is Colorado's interest in providing a forum. The majority concedes that Colorado has an interest but concludes that this interest is attenuated by the fact Canadian rather the Colorado law applies. I disagree.

"States have an important interest in providing a forum in which their residents can seek redress for injuries caused by out-of-state actors." *OMI,* 149 F.3d at 1092. This interest is separate from and in addition to the interest a state may have "where resolution of the dispute requires a general application of the forum state's law." *Id.; See Asahi Metal Indus. Co. v. Superior Court of Cal.,* 480 U.S. 102, 115, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987) (discussing the interest of various states to effectuate its "substantive policy" separate from the interest of the *forum* state in providing a forum for its own resident). Thus, the fact that the plaintiff is a resident of the forum state supports the finding that the exercise of personal jurisdiction is reasonable irrespective of what state's law may apply.

In this case, Benton is a resident of the forum state. In addition, he alleges that the injuries inflicted upon him by Cameco exceed 100 million dollars. Thus, Colorado has an "important interest" in providing a forum in which Benton can seek redress.

That Benton is a resident of the forum state also distinguishes the instant case from *OMI* holdings, a case heavily relied upon by the majority. In *OMI,* none of the parties were residents of the forum state and we noted

specifically that no party was claiming the defendants "committed a tortious act against or breached a contract with a [forum] resident." 149 F.3d at 1096. Were this otherwise, we observed that the forum's "interest in litigating the suit would undoubtedly be much higher." *Id.*

The importance that the plaintiff be a resident of the forum state was also emphasized in *Asahi.* There, both parties to the litigation were not only alien to the forum state, but alien to the country as well. *Asahi,* 480 U.S. at 114, 107 S.Ct. 1026. Based upon that fact, Justice O'Connor's plurality portion of the opinion noted that "[b]ecause the plaintiff is not a [forum state] resident, [the forum state's] legitimate interest in the dispute have considerably diminished." *Id.* This case does not involve a non-forum plaintiff as Cameco is alleged to have both breached a contract with and committed a tortious act against a forum resident. Appellant App. at 13-14.

iii

The Interstate Judicial System's Interest in Obtaining Efficient Resolution

This factor in the reasonableness inquiry is "whether the forum state is the most efficient place to litigate the dispute." *OMI,* 149 F.3d at 1097. Factors to be considered in determining efficiency include the location of witnesses, the situs of the injury, the controlling law, and the prevention of piecemeal litigation. Based upon these factors, the majority was convinced Canada would clearly be the more efficient venue. I do not believe the case to be so clear.

While several factors do not favor Colorado as a forum, the location of potential witnesses is ambiguous. Cameco asserts that the majority of the employees involved in the

MOU reside in Canada. However, Cameco also admits that some live in Minnesota. Moreover, Benton asserts that there are "approximately one dozen potential witnesses with pertinent relevant knowledge that reside in Colorado." Appellant App. at 103. Thus, no matter which forum is selected, Colorado or Canada, a substantial number of witnesses may need to travel. And, given the demonstrated ability of Cameco employees to travel to and from the United States, I do not believe Colorado is materially more inefficient than Canada.

C
Conclusion

Given the substantial and deliberate contacts Cameco engaged in with the State of Colorado through one of its residents and the less than compelling case of unfairness by litigating there, I conclude that due process is not offended by the exercise of personal jurisdiction over Cameco in this case. Accordingly, I respectfully dissent from the holding that litigation in Colorado would violate traditional notions of fair play and substantial justice.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior Judge Daniel B. Sparr

Civil Action No. 00-S-2336 (BNB)

OREN L. BENTON,
Plaintiff,

v.

CAMECO CORPORATION, a Canadian corporation,
Defendant.

ORDER

(Filed Nov. 15, 2002)

THIS MATTER comes before the Court on Defendant Cameco Corporation's Motion to Dismiss, filed February 27, 2001, together with four exhibits in support thereof. Plaintiff's response and seven exhibits were filed on March 26, 2001. Defendant filed a reply memorandum, after obtaining leave to do so, on April 13, 2001. Plaintiff then filed a surreply on April 25, 2001, together with a motion for leave to file which was granted on May 7, 2001. The Court has reviewed the extensive briefing and exhibits submitted and is now fully advised in the premises.

Plaintiff Benton's complaint has claims against Defendant Cameco Corporation (Cameco) for Breach of Contract and Tortious Interference, based on business dealings between the parties in 1994. Those dealings resulted in a Memorandum of Understanding (MOU) which was executed by the parties and forms the basis for Plaintiff's claims. Plaintiff's complaint refers extensively to the MOU, albeit Plaintiff does not attach a copy of the

MOU to the Complaint. Defendant furnished a copy of the MOU as Exhibit A to its motion to dismiss. The Court has considered the MOU in light of Plaintiff's reliance on the document as indicated above.

Furthermore, the MOU has been considered for purposes of this motion under F.R.Civ.P. 12 without converting it into a motion for summary judgment. A Rule 12(b)(6) motion, which this one is in part, must be converted to a motion for summary judgment if "matters outside the pleading are presented to and not excluded by the Court" and "all parties . . . (are) given reasonable opportunity to present all material made pertinent to such motion by Rule 56." Fed.R.Civ.P. 12(b).

> The failure to convert a Rule 12(b)(6) motion to one for summary judgment where a court does not exclude outside materials is reversible error . . . Notwithstanding these general principals, if a plaintiff does not incorporate by reference or attach a document to its complaint, but the document is referred to in the complaint and is central to the plaintiff's complaint, a defendant may submit an indisputably authentic copy to the court to be considered on a motion to dismiss.

GFF Corp v. Associated Wholesale Grocers. Inc., 130 F.3d 1381, 1384 (10th Cir. 1997) (citations omitted).

Cameco has requested that the complaint against it be dismissed for various reasons. Its first argument is that the service of the complaint was insufficient as a matter of law. Benton first served the complaint in Denver by leaving it with a secretary in the office of a Mr. Fletcher Newton. Mr. Newton is not an officer, director, or employee of the Defendant Cameco Corporation nor is Mr. Newton a registered agent for Cameco Corporation. In fact, there is

no registered agent in Colorado for Cameco Corporation. (See Exhibit B to Def.'s Mtn. at ¶¶ 3-4.) Mr. Newton is a registered agent for Cameco, Inc., which is a United States subsidiary for Cameco Corporation. *Id.* at ¶ 4.

A parent company which has a separate corporate existence is treated separately from the subsidiary in the absence of circumstances justifying disregard of the corporate entity. Service on a subsidiary does not constitute effective service on its parent, unless the subsidiary is an effective alter ego of the parent. No such showing has been made in this case. Accordingly, service on Cameco, Inc. cannot be considered service on Cameco Corporation.[1]

The issue of insufficiency of service argued in the motion to dismiss was subsequently mooted, as conceded by Defendant in its reply memorandum. This was based upon the fact that Plaintiff eventually served Defendant Cameco Corporation at its offices in Saskatoon, Saskatchewan. Initially, based upon Plaintiff's Exhibit B to their memorandum in opposition to motion to dismiss, the original service occurred on March 12, *2000* which appears obviously incorrect since the summons was dated March 5, *2001*, and the case was not filed until November 28, 2000. In addition, the notary certification on the return of service is dated March 19, *2001*.

This error, however, was apparently eventually corrected based upon the May 3, 2001 filing of a summons dated March 9, 2001, with a return of service showing

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[1] It is also true that in considering the later argument about jurisdiction, the business of Cameco, Inc. cannot be considered in determining whether Cameco Corporation was doing business in Colorado.

service on Cameco Corporation on April 9, 2001. Although the above discussion is moot for purposes of determining the date of service of process, it could be important to other issues raised by Defendant but not considered by the Court for purposes of this motion. In any event, Cameco Corp. has dropped its argument based on service of the complaint.

Cameco's second argument for dismissal is that this court lacks personal jurisdiction over it. The pertinent facts that must considered on this issue are largely undisputed. As noted in the case caption, Cameco Corp. is a Canadian company. Its principal place of business is in the province of Saskatchewan. Although, as mentioned, Defendant has a wholly-owned subsidiary that is a distinct corporate entity in Colorado, named Cameco Inc., the parent company has no office, property or employees in Colorado. Furthermore, Defendant has no bank account or mailing address in Colorado and does not pay taxes in this state. (Ex. B to Def.'s Mtn. at ¶¶ 3 and 7.)[2]

Briefly stated, Plaintiff's position regarding jurisdiction is that Defendant transacted business in Colorado and has therefore subjected itself to jurisdiction here. He argues that Defendant transacted business in Colorado by negotiating and executing a contract that would have been

[2] While the complaint is the normal place to start when considering a motion to dismiss, the present complaint contains very little in relation to the subject of personal jurisdiction. Consequently, in light of the fact that both parties submitted affidavits to be considered on the subject of jurisdiction, the Court has relied on the same as noted. In so doing, the Court feels that the parties have had an opportunity to submit evidence in support of their positions on the issue of jurisdiction and therefore deems it unnecessary to conduct a formal evidentiary hearing.

partly performed in Colorado and required payments made to Plaintiff in Colorado. It is Plaintiff's position that Defendant has sufficient connections with Colorado to be subject to either general or specific jurisdiction.

A plaintiff bears the burden of establishing personal jurisdiction over the defendant. *Wenz v. Memery Crystal,* 55 F.3d 1503, 1505 (10th Cir. 1995); *Behagen v. Amateur Basketball Ass'n. of the U.S.A.,* 744 F.2d 731, 733 (10th Cir. 1984), *cert. denied,* 471 U.S. 1010 (1985). Where, as here, a motion to dismiss is decided on the basis of affidavits, the plaintiff need only make a *prima facie* showing of jurisdiction. *Doe v. National Medical Servs.,* 974 F.2d 143, 145 (10th Cir. 1992); *Kennedy v. Freeman,* 919 F.2d 126, 128 (10th Cir. 1990). "However only well pleaded facts in the plaintiff's complaint, as distinguished from conclusory allegations, must be accepted as true." *Rusty Eck Ford-Mercury Corp. of Leavenworth v. American Custom Coachworks, Ltd.,* 184 F.Supp.2d 1138, 1141 (D.Kan. 2002).

In a diversity action, the law of the forum state determines whether a federal court has personal jurisdiction over a non-resident defendant. *Wenz,* 55 F.3d at 1506 (citations omitted); *Taylor v. Phelan,* 912 F.2d 429, 431 (10th Cir. 1990), *cert. denied,* 498 U.S. 1068 (1991). Ascertainment of personal jurisdiction requires a two-part analysis. *Wenz,* 55 F.3d at 1506-07. This court's jurisdiction must be sanctioned by Colorado's long-arm statute and it must comport with constitutional due process requirements. *Wenz,* 55 F.3d at 1506-07; *Far West Capital, Inc. v. Towne,* 46 F.3d 1071, 1074 (10th Cir. 1995). Colorado's long-arm statute is construed liberally so as to allow jurisdiction to the full extent permitted by due process. *Day v. Snowmass Stables, Inc.,* 810 F. Supp. 289, 291 (D.

Colo. 1993); *Classic Auto Sales. Inc. v. Schocket,* 832 P.2d 233, 235 (Colo. 1992); *Waterval v. District Court,* 620 P.2d 5, 8 (Colo. 1980), *cert. denied,* 452 U.S. 960 (1981); *Le Manufacture Francais des Pneumatiques Michelin v. District Court in and for Jefferson County,* 620 P.2d 1040, 1044 (Colo. 1980). Therefore, if jurisdiction is consistent with due process, Colorado's long-arm statute authorizes jurisdiction over a non-resident defendant.

Due process limits state power over a non-resident defendant by prohibiting the exercise of *in personam* jurisdiction unless a defendant has certain "minimum contacts" with the forum state such that maintenance of the suit does not offend "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington,* 326 U.S. 310, 316 (1945) (citation omitted); *accord Williams v. Bowman Livestock Equipment Co.,* 927 F.2d 1128, 1131 (10th Cir. 1991). In judging minimum contacts, the court must focus on the relationships between the defendant, the forum, and the litigation. *Shaffer v. Heitner,* 433 U.S. 186, 204 (1977). The "constitutional touchstone [is] whether the defendant purposefully established 'minimum contacts' in the forum State." *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 474 (1985). This 'purposeful availment' requirement is satisfied if the defendant's contacts with the forum "proximately result from actions by the defendant himself that create 'a substantial connection' with the forum" such that he "should reasonably anticipate being haled into court there." *Id.* at 474-75 (citation omitted). In other words, a defendant must have "purposely avail[ed] itself of the privilege of conducting activities with the forum state." *Hanson v. Denckla,* 357 U.S. 235, 253 (1958).

It is only under these circumstances that a defendant can be said to have a 'fair warning' and the degree of predictability required by the Due Process Clause that litigation may result in that jurisdiction from the activities defendant has directed there. *Burger King,* 471 U.S. at 472. "[P]arties who reach out beyond one state and create continuing relationships and obligations with citizens of another state are subject to regulations and consequences of their activities." *Id.* at 473 (citation omitted.)

"The *International Shoe* 'minimum contacts' standard may be met in either of two ways." *Trierweiler v. Croxton and Trench Holding Corp.,* 90 F.3d 1523, 1532 (10th Cir. 1996) (citation omitted). First, "[s]pecific jurisdiction may be asserted if the defendant has 'purposefully directed' its activities toward the forum state, and *if the lawsuit is based upon injuries which 'arise out of' or 'relate to' the defendant's contacts with the state." Doe,* 974 F.2d at 145 (emphasis added); *accord Kuenzle v. HTM Sport-Und Freizeitgerate AG,* 102 F.3d 453, 455 (10th Cir. 1996).

Second, general jurisdiction can attach to a non-resident defendant even where the alleged injury is unrelated to the defendant's contacts with the forum state. However, because general jurisdiction is not related to the events giving rise to the suit, courts impose a more stringent minimum contacts test, requiring the plaintiff to demonstrate that the defendant's general business contacts with the state are "continuous and systematic . . . so that the defendant could reasonably anticipate being haled into court in that forum." *Doe,* 974 F.2d at 146 (citations omitted); *accord Kuenzle,* 102 F.3d at 455.

For purposes of due process, "[i]t is well-established that phone calls and letters are not necessarily sufficient

in themselves to establish minimum contacts." *Far West,* 46 F.3d at 1077. Similarly, "[a] contract with an out-of state resident, standing alone, is insufficient to establish minimum contacts in that out-of-state forum." *Rusty Eck Ford-Mercury,* 184 F.Supp.2d 1143, citing *Burger King,* 471 U.S. at 479.

Plaintiff has argued that Cameco could be subject to specific jurisdiction in this matter because it directed its activities toward Plaintiff, a Colorado resident. He relies on the communications that were part of the negotiations between the parties to argue that Defendant's contacts with this forum were substantial.

As previously stated, the facts involved in the transaction at issue are generally not controverted. Although the complaint alleges that Defendant has an office in Colorado, Defendant has refuted that allegation by showing that the entity in Colorado to which Plaintiff has referred is a distinct corporate entity, albeit owned by Defendant. (Ex. B to Def.'s Mtn. at p.2)[3] The affidavit from Plaintiff states that the negotiations for the transaction at issue occurred in Colorado in that Plaintiff's representatives who exchanged telephone calls and faxes with Defendant were in Colorado. (Ex. C to Pla.'s Resp at ¶3.) The affidavit goes on to say that he received drafts of the proposed agreement in Colorado and others in Colorado had discussions with Cameco officials on his behalf. (*Id.* at ¶ 6.)

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[3] As previously noted, it would be inappropriate to consider the business of the subsidiary, Cameco, Inc. in determining whether Cameco Corporation was doing business in Colorado as Plaintiff has failed to make any allegation in the Complaint that the subsidiary was the general agent or alter ego of its parent company.

Plaintiff's affidavit also says that part of the performance of the parties' contract would have been performed in Colorado. (*Id.* at ¶ 9.) He does not elaborate on this statement, although his response brief notes that payments pursuant to the contract would have been made to him here. It is undisputed that Plaintiff and his businesses were based in Colorado at the time in question.

Defendant attempts to provide some explanation of Plaintiff's contention regarding performance. As described in the Complaint, the main transaction anticipated by the parties involved a sale of uranium by Cameco to Plaintiff that would enable Plaintiff to meet sales commitments which had been previously arranged. Defendant has explained in an affidavit by its Director of Market Planning and Administration that sales of uranium involve material that is either delivered to a conversion facility where it can be prepared for use, or to an enrichment plant where it is stored prior to delivery to the end user. (Ex. C to Def.'s Mtn. at ¶¶ 3 and 4.) This affidavit further states that there are no conversion facilities or enrichment plants in Colorado. (*Id.*) Consequently, there could be no delivery of any uranium products by Defendant to Colorado.

Plaintiffs sur-reply correctly notes that any factual disputes must be resolved in his favor at this point. The statement is made in reference to a contention that there are factual disputes involved in this motion. The Court does not agree that there are conflicting allegations that are relevant to this motion. In addition to all the previous matters discussed on which there is no dispute, it also appears to be undisputed that representatives of Defendant spent two days in Colorado in late 1994 doing a 'due diligence' inspection. Furthermore, while the parties agree

that they had dealings together prior to the incident at issue in this complaint, there is no suggestion that these "spot" market transactions had any relationship to this forum, aside from Plaintiff's presence here.

Plaintiff has not alleged that any representatives of Cameco made any other trips to Colorado or otherwise 'availed [themselves] of the privilege of conducting activities' in this state. Nor can consideration of these additional incidents transform Cameco's Colorado contacts into something that could be described as "continuous and systematic" such that they would justify the exercise of general jurisdiction. *Rambo v. American Southern Insurance Co.*, 839 F.2d 1415, 1418 (10th Cir. 1988).

Plaintiff has argued that Cameco, Inc., is the general agent or alter ego of Cameco Corporation and therefore its activities in Colorado can be imputed to the parent company. This argument is not persuasive as indicated in the Court's previous discussion on service of process over the Defendant. *Quarles v. Fuqua Ind., Inc.*, 504 F.2d 1358, 1362 (10th Cir. 1974). (Trial court was affirmed in holding that defendant had not engaged in business in Kansas and therefore was not subject to jurisdiction based on activities of its subsidiary where there was no showing that the defendant conducted business through the subsidiary as its alter ego or agent.)

Finally, the Court notes that it is Plaintiff's contention that Saskatchewan law would apply to his claims. While the parties seem to acknowledge that it is only application of the Canadian statute of limitations that would allow Plaintiff's claims to proceed, this situation creates an additional concern about the fairness of requiring a foreign defendant to litigate in this country.

> When the defendant is from another country, the concern [stemming from the burden on the defendant of litigating the case in a foreign forum] is heightened and "great care and reserve should be exercised" before personal jurisdiction is exercised over the defendant. However, in certain cases, the interests of the plaintiff and the forum in exercising jurisdiction may be so strong as to "justify even the serious burdens placed on the alien defendant."

OMI Holdings, Inc. v. Royal Ins. Co. of Canada, 149 F.3d 1086, 1096 (10th Cir. 1998), quoting *Asahi Metal Industry Co. v. Superior Court of California,* 480 U.S. 102, 114 (1987).

The Court finds that the interests of Plaintiff and the forum in exercising jurisdiction over these claims is not so strong as to require that Cameco be subjected to these burdens. Under the circumstances as discussed above, the Court must conclude that Cameco's connection with Colorado was tangential at best. The Court cannot find that Cameco 'purposefully directed' its activities toward Colorado or that it availed itself of the privileges and benefits of conducting any activities here.

Accepting all well-pled, uncontroverted allegations as true and viewing the facts in the light most favorable to Plaintiff, the Court concludes that the exercise of personal jurisdiction over Defendant is not proper pursuant to due process and Colorado's long-arm statute and the case must therefore be dismissed on that basis.

Although it is technically unnecessary and possibly even inappropriate for the Court to consider the merits of the claims where it has found that it lacks jurisdiction, in the interests of conserving resources of both the litigants

and the judicial system, the Court feels compelled to do so. Defendant has contended in its motion to dismiss that the four corners of Plaintiff's complaint fails to state a claim against it. Cameco submits that Plaintiff's complaint, which alleges two causes of action is fatally flawed. The motion to dismiss raises substantial issues in that regard. Defendant notes that the claims are based almost exclusively on the interpretation of the MOU executed between Defendant and Plaintiff. In fact, the main factual issue in this case is whether the MOU was an 'agreement to agree' or a binding contract.

The MOU describes potential agreements to be entered into by the parties. Plaintiff contends that a plain reading of the document mandates a determination that it constitutes a contract rather than merely an agreement to enter into future contracts, subject to certain conditions precedent. It is important to note that Benton's complaint concedes that the MOU expressly conditions the existence of these potential transactions upon certain occurrences or performance.[4]

The MOU identifies certain conditions in paragraph 10. These conditions include:

a. A due diligence review by Cameco of Benton's sales contracts,

b. A determination by Cameco that all such contracts are as represented,

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[4] The complaint alleges at ¶ 30 that "A MOU was subject to approval by Cameco's board of directors ("Board"), a due diligence investigation and other conditions not material to this suit. Each of the conditions, except for board approval, were satisfied by late November 1994."

c. Preparation of comprehensive and detailed agreements consistent with the memorandum but also containing other terms and conditions "normal and customary, and acceptable to the parties,"

d. Cameco's satisfaction that by entering into the agreement it would not be inheriting liabilities incurred by Benton except as expressly stated,

e. The receipt of necessary third-party consents, certificates, or agreements.

f. Government approvals,

g. Agreed upon security having been fully been put in place and determined to be adequate by satisfactory legal opinions for Cameco and

h. The approval of Cameco's board of directors.

It appears unrefuted that none of these conditions were satisfied. Although the Court must accept the allegations of the complaint as true for purposes of this motion, as Defendant observes, should this case proceed on the merits, it appears obvious that this allegation will be totally without support.

Again, the Court is very cognizant that it must at this point accept all well-pled, uncontroverted allegations in the complaint as true and view the facts in the light most favorable to Plaintiff. Nevertheless, a fair reading of the MOU makes it clear to the Court that although there may be an issue as to the satisfaction of some of the conditions in question, there is no issue that these events were expressly set forth as conditions precedent in the MOU. Furthermore, it is clear that the afore-referenced conditions include the approval of the Cameco board of directors, a

condition which Plaintiff, in paragraph 30 of his complaint, affirmatively alleges did not occur.

Therefore, as Defendant argues in support of its motion to dismiss the complaint for failure to state a claim, there could be no contract to breach. The uncontroverted failure to perform a condition precedent clearly precludes the formation of a contract. Whether the Court were to apply Colorado law (which the parties essentially concede would defeat the claims based on the statute of limitations), or Saskatchewan law which specifically holds that an unfulfilled condition prevents a formation of a contract, it is clear that Plaintiff's contract claim could not survive. (Exhibit D to Def.'s Motion, Declaration of Gordon J. Kuski, Q.C., at para 5.)

As to the tort claim, the fact that the board of directors did not approve the agreement cannot constitute a lack of bona fide honesty or good faith simply because it was not consistent with the feeling of security Plaintiff obtained from whatever Vice President Grandey said to him.

It appears that both under Colorado and Saskatchewan law Cameco's directors were entitled if not mandated to exercise discretion in their review of the proposed transactions. See *Great Western Producers Cooperative v. Great Western United Corporation,* 613 P.2d 873 (Colo. 1980) and the Tenth Circuit's holding in *R-G Denver. Ltd. v. First City Holdings of Colorado. Inc.,* 789 F.2d 1469, 1474-75 (10th Cir. 1986), where the Tenth Circuit held that even where a trust's purchase agreement was expressly conditioned on the approval of trust's shareholders, the trustees continued to be charged with fiduciary obligations requiring them to exercise independent judgment on the transaction even if such judgment lead them to change their mind and never even hold a shareholder vote.

In substance, a director must always act independently and reasonably based upon his or her view of what is best for the corporation and above all must act in the best interests of the corporation under either Colorado or Saskatchewan law.

Plaintiff may not contend that Defendant's board of directors was obligated to him to abandon their fiduciary duty or independent business judgment. Accordingly, both Benton's first and second claims are without merit on their face. As Defendant argues in its motion, although it is styled as a separate cause of action, Benton's second claim (tortious interference) appears to be only a repackaged attempt to allege that Cameco's board of directors should somehow be barred from making independent business judgment about proposed business transactions.

The Court therefore concludes that even if it had personal jurisdiction over Defendant, Plaintiff's complaint read on its face and accepted as true would not state a cognizable cause of action against this Defendant and would have to be dismissed.

It is, therefore, ORDERED that based upon lack of jurisdiction over Defendant, Cameco Corporation's Motion to Dismiss is GRANTED and Plaintiff's complaint is dismissed.

DATED at Denver, Colorado, this 14th day of November, 2002.

BY THE COURT

/s/ Daniel B. Sparr

Daniel B. Sparr
Senior United States
District Judge

Case No. 00-S-2336 (BNB)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the ORDER signed by Senior Judge Daniel B. Sparr on November 14, 2002, was served pursuant to Rule 5, Fed.R.Civ.P., on November 15, 2002, by (*) hand delivery; (**) delivery of same to their respective Court pick-up box; (***) depositing the same in the United States mails, postage prepaid, to the following:

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Magistrate Judge Boyd N. Boland

/s/ Lucy West
Secretary/Deputy Clerk

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

OREN L. BENTON, Plaintiff-Appellant, v. CAMECO CORPORATION, a Canadian corporation, Defendant-Appellee.	No. 02-1548

ORDER

Filed October 5, 2004

Before **HENRY, HOLLOWAY**, and **ANDERSON**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Judge Holloway would grant panel rehearing.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: /s/ Karen Phillips
Deputy Clerk